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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Railway Labor Act protects newly-hired workers, who were not hired to be strike replacements, from employer retaliation when they participate in a lawful strike on the date designated by a carrier as their first day of employment.

2. Whether the court of appeals violated the principles established in *Icicle Seafoods, Inc.* v. *Worthington*, 106 S. Ct. 1527 (1986), by engaging in de novo factfinding after reversing the district court's legal standard for determining employee status under the Railway Labor Act.

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IN THE

Supreme Court of the United States

October Term, 1986

No. 86-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Air Line Pilots Association, International ("ALPA") hereby requests that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this proceeding to the extent the court of appeals reversed the judgment of the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-56a) is reported at 802 F.2d 886 (7th Cir. 1986). The findings of fact and conclusions of law entered by the district court (App. 57a-122a) are reported at 614 F. Supp. 1020 (N.D. Ill. 1985); the subsequent order of the district court modifying its findings of fact and conclusions of law (App. 123a-128a) is reported at 616 F. Supp. 849 (N.D. Ill. 1985).

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1986. (App. 129a-130a). The order of the court of appeals denying rehearing was entered on December 22, 1986. (App. 131a-132a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case concerns the proper interpretation of §§ 1, Fifth and 2, Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, Fifth and 152, Fourth. These and other pertinent statutory provisions are reprinted in the separately presented Appendix to this petition. (App. 133a-136a).

STATEMENT OF THE CASE

This petition raises issues of widespread importance in the air and rail transportation industries concerning the rights of newly-hired workers and the scope of permissible carrier coercion under the RLA. The case arose from the 1985 labor dispute between respondent United Air Lines, Inc. ("United") and petitioner ALPA, the authorized collective bargaining representative under the RLA for the pilots employed by United. In the course of that dispute, the United pilots engaged in a lawful strike over United's demand for a reduced pay scale for newly-hired pilots. Motivated by "anti-union sentiment" (App. 21a n.11), United responded to the imminent strike with measures in part designed "to destroy the union or at the very least discourage union membership." (App. 21a). ALPA thereupon commenced this action in the district court alleging that United's efforts to break the strike and to destroy ALPA violated the RLA; the district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1337.

Shortly after the conclusion of the strike, ALPA sought relief in the district court from three features of United's strike program: (1) United's effort to coerce several hundred newly-hired pilots (the "Group of 500") to serve as strikebreakers by threatening that they would "never, ever, work for this air line, ever" (App. 7a) if they joined the strike on the day designated by United as their first day of work; (2) United's attempt to reward nonstriking pilots, and punish strikers, by granting a form of superseniority to nonstriking pilots in a system-wide rebid of pilot positions; and (3) United's award of premium pay to certain pilots hired from other airlines to serve as strike replacements. This petition concerns United's coercion of the Group of 500, who were selected and trained by United for purposes of business expansion and who received offers of employment which "were not contingent on working during a strike" (App. 107a), but whom United refused to recall following the strike.

Beginning in the autumn of 1984, United experienced a pilot shortage as a result of workforce attrition and planned business expansion. (App. 63a). To meet its operational needs, United selected 600 of approximately 4,800 applicants, trained several hundred of these individuals for entry-level second officer positions, and informed them that they would have priority with respect to future offers of employment for those positions. (App. 65a-66a). Although members of this Group of 500 became provisionally qualified to serve as second officers upon the completion of their initial training, United declined to employ them while it negotiated with ALPA to obtain a reduced pay scale for new hires. (App. 64a-67a). The last time United hired pilots prior to the Group of 500, it placed them on the payroll on their first day of initial pilot training (App. 63a-64a); United immediately reverted to this practice on May 17, 1985, with respect to strike replacements. (App. 69a).

On April 20, 1985, United made unconditional written offers of pilot employment effective May 17, 1985, to the bulk of the Group of 500. (App. 67a). Under the RLA's mandatory process of negotiation and mediation, United either would reach agreement with ALPA for a reduced new-hire pay scale by that date or would be free to impose its final bargaining proposal concerning the new-hire pay scale. The Group of 500 accepted these offers of employment and, at United's direction, began reporting for a brief refresher training course in early May. During this period, United confirmed to the Group of 500 that their "change to 'permanent status will occur on May 17, 1985.' " (App. 67a) (quoting Pl. Ex. 6). Indeed, 150 Group members received written confirmation of their status as a "United Airlines line pilot" prior to May 17. (Court Ex. 1 ¶ 44; Pl. Ex. 75). United admitted that it did not hire the Group of 500 to serve as strikebreakers and that its job offers to Group members were not contingent on their working during a strike. (App. 68a, 107a-108a). Instead, United pursued an entirely separate hiring program to attract strike replacements. (App. 107a).

Despite these commitments, "after the Group of 500 had returned to [United's facilities in] Denver . . . United attempted to coerce them into serving during the strike." (App. 108a). Some of the Group of 500 members were warned that they "would not make it through their probation year" if they joined the strike. (App. 69a). Others were told they would be "terminated." (App. 70a). United's chief executive officer warned that, if the Group of 500 did not work during a strike, "they will never, ever, work for this airline, ever." (App. 69a).

On May 17, the United pilots began their strike over the reduced new-hire pay scale. At that point, the Group of 500 faced the following choice imposed by United: they

could either join the strike at the risk of never working for United or serve as strikebreakers and take the jobs of the pilots who were striking over United's demand for a reduced new hire pay scale which would apply to the Group of 500. Most of the Group of 500 decided to join the strike. Those who crossed the picket line were promptly placed on the payroll and given conditional pilot seniority numbers. (App. 69a; Pl. Exs. 82, 83). During the strike, United hired approximately 540 pilots through its strike replacement program; more than half of these pilots did not enter training until after the strike. (App. 125a-126a). United treated all the pilots who accepted offers of employment during the strike as permanent replacements. (App. 125a-126a). After the strike ended, United refused to recall the Group of 500 members who failed to cross the picket line "except for cases involving personal hardship or other extenuating circumstances." (App. 9a).

Following a two-week trial, the district court held that the Group of 500 were United employees as of May 17, 1985, under § 1, Fifth of the RLA, 45 U.S.C. § 151, Fifth, because United had unconditionally designated that date as their first day of work. (App. 103a-104a). Relying on the reasoning of *NLRB* v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir. 1962), the district court concluded that "[p]hysically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment" (App. 103a) and "would be little more than an empty gesture." (App. 104a). The court further held that United's effort to coerce the Group of 500 into serving as strikebreakers violated § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. (App. 101a-102a). The court ordered United to restore the striking Group of 500 members to the status of employees, with seniority dating from May 17, and enjoined United from

discriminating against striking pilots in the award of pilot positions. (App. 121a-122a). The district court also found that United's attempt to reward nonstriking pilots with a form of superseniority violated § 2, Fourth of the RLA and that United's premium payments to strike replacements were lawful. (App. 110a-114a). After a subsequent motion by United, the court modified its order to permit United to delay the recall of striking Group of 500 members until United had additional vacancies following the completion of training of the strike replacements. (App. 123a-128a).

On appeal by United and cross-appeal by ALPA, the court of appeals affirmed the district court's rulings as to the strike rebid scheme and the premium pay for replacements. The court explained that "the rebid was an attempt by United either to destroy the union or at the very least discourage union membership." (App. 21a). However, the court reversed the district court's conclusion that the Group of 500 members were statutory employees with the right to strike as of May 17, 1985. The court held that it was "forced to conclude" (App. 44a) that the "plain and ordinary meaning" of the RLA prohibited a newly-hired pilot from being treated as a statutory employee "unless [the pilot] has performed services for the employer under that employer's supervision." (App. 48a). The court of appeals thus reached the unlikely conclusion that the Group of 500 could not participate in ALPA's lawful strike over their pay scale without first serving as strikebreakers by "performing work" for United during the strike. In applying this newly-devised legal standard, moreover, the court of appeals engaged in a de novo resolution of disputed issues of material fact to determine that the Group of 500 had not actually "performed work" for United in May of 1985. (App. 44a-48a).

The court of appeals denied ALPA's petition for rehearing and suggestion for rehearing in banc on December 22, 1986 (App. 131a-132a), but later stayed the issuance of its mandate pending ALPA's filing of this petition.

REASONS FOR GRANTING THE WRIT

The court of appeals' novel construction of the RLA, which denied newly-hired pilots the statutory right to join a lawful strike on the date designated by the carrier as their first day of employment, presents important questions of federal law under § 1, Fifth and § 2, Fourth of the RLA that have not been, but should be, resolved by the Court. In addition, the court of appeals' interpretation of employee status under the RLA conflicts with a prior decision of the Court, decisions of the First, Sixth and Ninth Circuits courts of appeals and decisions of the National Mediation Board ("NMB"). Even if the court of appeals correctly interpreted § 1, Fifth, it disregarded the Court's recent decision in *Icicle Seafoods, Inc.* v. *Worthington,* 106 S. Ct. 1527 1986), by finding that the Group of 500 did not "perform work" for United despite the existence of material unresolved factual issues under its newly-devised legal standard.

I. THE COURT OF APPEALS' CONSTRUCTION OF EMPLOYEE STATUS UNDER THE RLA PRESENTS IMPORTANT, UNRESOLVED QUESTIONS OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF THIS COURT, OTHER COURTS OF APPEALS, AND THE NATIONAL MEDIATION BOARD.

Employees subject to the RLA "enjoy the right to engage in primary strikes over major disputes," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 384 (1969), and, as the court of appeals reaffirmed in this case, enjoy statutory protection from employer retaliation

for participating in a lawful strike under § 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth. (App. 16a-21a). *See also Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 124 Lab. Rel. Rep. (BNA) 2145, 2149-51 (1st Cir. Dec. 22, 1986). The court of appeals nonetheless felt compelled by the "plain meaning" of § 1, Fifth to hold that a newly-hired pilot may only join in a lawful strike on the day designated by a carrier as his first day of work without fear of employer retaliation if he first crosses the picket line and works as a strikebreaker. This construction of § 1, Fifth also prevents new hires from participating in the selection of a bargaining representative after they have been placed on the payroll but are awaiting their first work assignment, in direct conflict with the NMB's application of § 2, Fourth in representation disputes. Moreover, the court of appeals' construction of § 1, Fifth has created an unprecedented and powerful economic weapon for employers to coerce incumbent employees in exercising their right to strike.

1. Contrary to the court of appeals, the Court has recognized that the literal language of § 1, Fifth does not address the temporal issue of when a person becomes or ceases to be an "employee." In *Pennsylvania R.R.* v. *Day*, 360 U.S. 548 (1959), the Court held that employees who had retired and relinquished all rights to return to railroad service were included within the § 1, Fifth definition of "employee" for purposes of determining National Railroad Adjustment Board jurisdiction of "disputes between an employee . . . and a carrier" under § 3, First (i) of the RLA, 45 U.S.C. § 153, First (i). *See Day*, 360 U.S. at 550-53. The Court in *Day* rejected the position that, under the "plain meaning of its language," § 1, Fifth does not apply to a retiree, who "could not be, and was not 'in the service' of the railroad or 'subject to its continuing authority to supervise . . . the

manner of rendition of his service.' " *Id.* at 555-56 (Black, J., dissenting) (quoting 45 U.S.C. § 151, Fifth). Instead, the Court held that "[t]he purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated." *Day*, 360 U.S. at 552; *accord Air Line Pilots Ass'n, Int'l* v. *Alaska Air Lines, Inc.*, 735 F.2d 328, 328-29 (9th Cir. 1984).

Notwithstanding the clear direction of the *Day* decision, the court of appeals believed "[i]t would be in direct contravention of the RLA's definition of employee to conclude that a person may become an employee even though he never performed any work for the employer and was never under that employer's direct supervision." (App. 47a). However, as the Sixth Circuit explained in *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F.2d 340 (6th Cir. 1937), the primary phrase defining employee status in § 1, Fifth is "in the service of a carrier." The parenthetical phrase "(subject to its continuing authority to supervise and direct the manner of rendition of his service)" simply "codifies the common law rule of master and servant." *Id.* at 342. The testimony of labor spokesperson Donald Richberg in the 1926 RLA hearings confirms that this phrase was a term of art "taken from the classification orders of the Interstate Commerce Commission" and "used to distinguish between the regular employee of the railroad and the independent contractor." Hearings on H.R. 7180 Before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 65 (1926).[1] Congress intended the clause "performs any

[1] As the Court has often noted, the 1926 RLA consisted of an agreement worked out between representatives of labor and the carriers which was subsequently enacted into law. *See, e.g., Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 576 (1971). As the labor spokesperson for that agreement, Richberg's statements in the congressional hearings "are entitled to great weight in the construction of the Act." *Id.*

work defined as that of an employee or subordinate official" to distinguish between statutory employees or subordinate officials and supervisors. *See Nashville*, 93 F.2d at 342; *see also Brotherhood of Locomotive Firemen* v. *ICC*, 147 F.2d 312, 315 (D.C. Cir.), *cert. denied*, 325 U.S. 560 (1945); *Northwest Airlines, Inc.*, 2 N.M.B. 19, 23-26 (1948). Accordingly, the court of appeals' conclusion that a person must first "perform work" for a carrier "under its supervision" to become an RLA employee under § 1, Fifth simply misapprehended statutory terms of art which Congress did not intend to determine when an RLA "employment relationship," *Day*, 360 U.S. at 552, begins or terminates.

2. Instead of using a "plain meaning" approach to determine "employee" status under § 1, Fifth, the Court in *Day* looked to "[t]he clash of economic forces which led to the passage of the Act, the history of the enactment, and the legislative policies which it expresses and which guide judicial interpretation," *Day*, 360 U.S. at 550, and the specific policy concerns embodied in the substantive RLA provision at issue in that case, *see id.* at 551-53. The *Nashville* court likewise rejected a "too literal" approach to construing § 1, Fifth and focused instead on the scope of RLA bargaining obligations to determine whether furloughees were "employees" for purposes of eligibility to vote for a bargaining representative. *See Nashville*, 93 F.2d at 343. The Court has also explained that the definition of "employee" in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, can only be interpreted by reference to "the history, terms and purposes of the legislation" and " 'must be read in light of the mischief to be corrected and the end to be attained.' " *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (quoting *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251, 259 (1940)).

Indeed, the Court has interpreted the term "employee" in the NLRA to exclude retirees in applying an employer's obligation to bargain with "the representative of the employees" under 29 U.S.C. § 158(d) and to include retirees in defining the conditions on employer payments to a union trust fund for the benefit of "employees" under 29 U.S.C. § 186(c)(5). *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 152, 166-71 (1971). In stark contrast to *Day*, *Nashville*, and these NLRA decisions, the court of appeals explicitly refused even to consider the purposes of § 2, Fourth in deciding that a newly-hired pilot cannot be an "employee" until he performs work under a carrier's supervision. (App. 44a n.17).

3. In determining whether the Group of 500 were employees for purposes of applying § 2, Fourth, the district court concluded that they became statutory employees on the date designated by United as their first day of employment. This conclusion is consistent with the "in the service of a carrier" language of § 1, Fifth, the decisions of the NMB and the Sixth Circuit in *Nashville*, and the purposes of § 2, Fourth.

If May 17, 1985, had been the eligibility cut-off date in a representation election rather than the first day of a strike, the district court's unreversed factual findings would clearly establish the Group of 500 as statutory employees for § 2, Fourth purposes. In determining which workers may exercise the § 2, Fourth right to select a collective bargaining representative, the NMB has explicitly included all individuals who have a substantial and reasonable expectation of performing future services for the carrier as RLA "employees" under § 1, Fifth.[2] In *Air Micronesia*, 10

[2] *See* NMB Representation Manual § 5.303 (1985) (temporary employee eligible to the extent he has "a reasonable expectation of

(footnote continued on following page)

N.M.B. 11 (1982), the NMB applied this reasonable expectation standard to exclude individuals who had completed training two years before the election but had never been offered employment, whose "present availability was unknown," and who "have at best the mere hope of an offer if an opening arises at some time in the future." *Id.* at 14-15. The court of appeals' construction of "employee" forecloses the inquiry mandated under *Air Micronesia* and substitutes its own test of whether an individual has ever "performed work" for a carrier. The court of appeals' interpretation of § 1, Fifth directly conflicts with the NMB decision in *Scheduled Skyways, Inc.*, 12 N.M.B. 488 (1983), that pilots undergoing initial pilot training while on the payroll of a carrier, but not yet assigned to fly the carrier's aircraft, are employees under § 2, Fourth. *See id.* at 489-91.

In *Nashville*, the Sixth Circuit likewise held that furloughees who possess seniority rights are "employees" for purposes of eligibility to vote for a bargaining representative because they have a present interest in negotiations which affect the rules, rates of pay and working conditions that will apply to them at such time, if any, that they may perform work for the carrier in the future. *See Nashville*, 93 F.2d at 343. In the absence of a strike on May 17, 1985 —the date designated by United for inclusion on the seniority list and assumption of permanent status (App. 67a; Court Ex. 1 ¶ 43)—members of the Group of 500 would have had the same expectation of ongoing employment as

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(footnote continued from preceding page)

continued employment or reemployment"); *Id.* § 5.311 (disabled employee eligible "if the employee retains rights of reemployment"); *Id.* § 5.305 (furloughees eligible if they "retain an employer-employee relationship and have a reasonable expectation of returning to work.").

any incumbent United pilot and would have had the same interest in bargaining over rules, rates of pay and working conditions. Indeed, those who crossed the picket line on May 17 plainly had a statutory interest in pilot working conditions even though they did not perform any "work" for United on that date. (App. 69a). Under the *Nashville* court's construction of § 1, Fifth, the Group of 500 thus established an "employer-employee relationship" with United on May 17, 1985.[3]

4. In terms of the purposes underlying § 2, Fourth, the fact that most Group of 500 members respected the picket line cannot constitute a basis for denying employment status as of May 17, 1985. The right to engage in a lawful strike at the conclusion of the major dispute procedures mandated by the RLA is an "integral" element of the effective exercise of the § 2, Fourth right to engage in collective bargaining. *See Jacksonville Terminal,* 394 U.S. at 384-86; *cf. Brotherhood of Ry. & S.S. Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246-47 (1966). Thus, to effectuate the purposes of § 2, Fourth, the protection from retaliation for engaging in a lawful strike must at least extend to all those who would otherwise be eligible to select and join with a representative in engaging in collective bargaining.

In the district court, United claimed that the Group of 500 never formed an employer-employee relationship with United because they never "reported to work" and had their payroll forms signed by United. Yet the record established that payroll forms for newly-hired strikebreakers were not

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[3] At a time when United placed student pilots on the payroll at the commencement of their initial training, United never questioned their employee status as of their first day of initial pilot training under a statutory standard ("in the employ of any employer") indistinguishable from the "in the service" language of the RLA. *See Pomrening* v. *United Air Lines, Inc.*, 448 F.2d 609, 611 (7th Cir. 1971) (construing 50 U.S.C. App. § 459).

signed until days or weeks after they were placed on the payroll as of May 17. (Pl. Exs. 82, 83). Moreover, the district court found that "[p]hysically reporting to work to establish an employer-employee relationship is not a prerequisite to the right to strike on the first day of employment." (App. 103a). Regardless of its justification in other circumstances, a "report to work" requirement only serves an anti-union purpose when applied in a strike because the sole distinction between those who report to work and those who do not is whether they oppose or join the strike. Thus, in *NLRB* v. *New England Tank Indus., Inc.*, 302 F.2d 273 (1st Cir. 1962), the First Circuit rejected an employer's contention that three individuals who had been offered and accepted employment, but who engaged in a strike on the day designated as their first day of work, "had never actually effectuated an employer-employee relationship with the company and therefore could not 'strike' against it." *Id.* at 277. Instead, the court held that "to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture." *Id.* at 278.

The court of appeals recognized that *New England Tank* "may at first glance seem to support the district court's conclusion" (App. 46a), did not question that both the RLA and NLRA protect strikers from employer coercion, and did not challenge the *New England Tank* court's application of this policy to a strike under the NLRA. (App. 46a-47a). Instead, it regarded "the plain and ordinary meaning of the words" of § 1, Fifth to be conclusive in the absence of "convincing evidence that Congress did not intend that the RLA's definition of employee meant what it said." (App. 47a-48a). As explained above, however, both the legislative history of the RLA and the Sixth Circuit's opinion in *Nashville* convincingly demonstrate that

the "supervision" and "performs any work" clauses of § 1, Fifth do not refer to preconditions to being "in the service of a carrier," but plainly express, through statutory terms of art, the distinction between employee status and independent contractor or supervisory status. *See supra* pp. 8-10. Given this legislative history and the purposes of § 2, Fourth, the court of appeals should have followed the First Circuit by holding that the Group of 500 had the right to strike under the RLA on the date designated by United as their first day of employment.

5. The district court both determined that the Group of 500 became employees on May 17, 1985, and further concluded that, even prior to May 17, "United's belated attempt to require members of the Group of 500 to cross a lawful picket line as a condition of employment is unlawful under the RLA." (App. 103a). When considered in the context of United's overall program to break the pilot strike (App. 21a), which included its attempts to coerce the Group of 500 to become strikebreakers (App. 69a, 76a-79a),[4] the district court's decision that United's threats prior to May 17 were unlawful effectuated the purposes of § 2, Fourth to protect the rights of employees, including incumbent pilots, to engage in a lawful strike.

In reversing the district court, the court of appeals authorized carriers to obtain involuntary, coerced strikebreakers, in addition to voluntary strike replacements, and thereby created a powerful economic weapon for carriers to use against incumbent employees. To recognize protected "employee" status only after work is performed during a strike, but to allow permanent replacement status to attach at the point the replacement accepts an offer of permanent employ-

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[4] United did not hire the Group of 500 to serve as strikebreakers (App. 68a), but had a separate program for hiring strike replacements. (App. 107a).

ment,[5] gives carriers a judicially-created advantage in the exercise of self-help without any statutory basis. *See generally Jacksonville Terminal,* 394 U.S. at 391-93.

While hiring voluntary permanent replacements may not violate § 2, Fourth of the RLA or comparable NLRA provisions, any additional employer measures to obtain strikebreakers must be carefully scrutinized to determine the employer's actual motivation and business purpose. (App. 17a-21a). *See generally NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-37 (1963). In this case, United's anti-union purposes and its lack of business justification for coercing the Group of 500 to cross the picket line are firmly established in the district court's findings. (App. 70a-72a, 103a, 107a-108a). Accordingly, §§ 1, Fifth and 2, Fourth should be construed to apply to carrier attempts to coerce new hires to become strikebreakers in order to effectuate the right of all "employees" to engage in a lawful strike.

II. THE COURT OF APPEALS IMPERMISSIBLY ENGAGED IN ITS OWN FACTFINDING IN DIRECT CONFLICT WITH RECENT DECISIONS OF THIS COURT.

The Court has unequivocally held that Rule 52(a) of the Federal Rules of Civil Procedure prohibits a federal court of appeals from making "factual findings on its own." *See Icicle Seafoods, Inc.* v. *Worthington,* 106 S. Ct. 1527, 1530 (1986); *Anderson* v. *City of Bessemer,* 105 S. Ct. 1504, 1512-13 (1985). Particularly when a court of appeals reverses a district court on the applicable legal

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[5] In this case, the district court held that United's 539 newly-hired strikebreakers attained permanent replacement status at the time they accepted United's offer of employment, not when they actually "performed work" for the carrier. (App. 127a). Only 64 of these strikebreakers were placed in line service during the strike; 272 had not even commenced initial pilot training before the strike ended. (App. 127a-128a; Smith Aff. ¶ 3-5).

standard, Rule 52(a) compels "a remand . . . unless the *record* permits *only one* resolution of the factual issue," *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1974) (emphasis added), just as it compels a remand where the district court "failed to make findings of fact essential to a proper resolution of the legal question," *Icicle Seafoods*, 106 S. Ct. at 1530.

Even assuming the validity of the court of appeals' new legal standard for "employee" status under the RLA, the court of appeals impermissibly *found*, as a matter of fact, that the Group of 500 "never performed any work for United nor did they ever submit to United's supervision of them in their work." (App. 44a). The district court had no occasion to and did not make factual findings concerning the performance of "work" under United's "supervision" simply because facts concerning the Group of 500's activities, while dispositive of the issue under the court of appeals' new standard, were irrelevant to the district court's focus on United's unconditional designation of May 17 as the first day for permanent employment status. Moreover, the district court never considered the status of any subgroup within the Group of 500, based on their activities or otherwise, at any point in time between the commencement of initial training and May 17, 1985. Questions concerning the Group of 500's "particular activities" and "how [they] spent their . . . time" are "question[s] of fact" for the district court which are "essential to a proper resolution of the legal question" as newly defined by the court of appeals, *see Icicle Seafoods*, 106 S. Ct. at 1530, but were not the subject of factfinding pursuant to the district court's legal standard.

Moreover, the court of appeals relied on the absence of any "dispute regarding the factual findings made by the

district court surrounding the Group of 500" to conclude that the only "issue is whether, *given these facts,*" the Group of 500 satisfied the legal standard for "employee" under the RLA. (App. 42a) (emphasis added). This conclusion utterly ignored the court's obligation under *Swint* to review the record as a whole—not merely the district court's factual findings—and to determine whether "the record permits only one resolution of the factual issue" under a newly-adopted legal standard. *Swint*, 456 U.S. at 292. Even a cursory review of the record, however, compels the conclusion that the court of appeals' new legal standard gives rise to numerous disputed issues of material fact which can only be resolved by the district court.

For instance, the record thus far indicates that approximately 16 of the Group of 500 had "dates of hire" by United prior to May 17 (Pl. Ex. 90), and that an undetermined number of these were employed as Flight Officer Training Instructors ("FOTI's") prior to that date. (Tr. 1484-85, 1487). The NMB has twice held that United's FOTI's are "employees" under the RLA. *United Air Lines, Inc.*, 10 N.M.B. 458, 466-67 (1983); *United Air Lines, Inc.*, 9 N.M.B. 266, 280-81 (1982). Indeed, in a separate lawsuit, the court explicitly found that five former United FOTI's who are members of the Group of 500 were "employees" under the RLA at the time of the 1985 strike. *See Arthur* v. *United Air Lines, Inc.*, No. 85-Z-1835 (D. Colorado July 3, 1986) (order). Additional factfinding is therefore required to determine the number of FOTI's in the Group of 500 employed by United prior to the strike, and any other positions in which United employed Group of 500 members prior to May 17.

Another group of approximately 10-12 of the Group of 500 had both completed their refresher training and

performed their initial operating experience ("IOE") prior to May 17. (App. 69a-70a). Pilots performing their IOE operated United aircraft under the supervision of a United check airman (Tr. 1185-87) in accordance with Federal Air Regulations which require that IOE "must be acquired in flight during operations under this part." 14 C.F.R. § 121.434(b)(3). Accordingly, the record plainly permits the finding that this subgroup "performed work" under United's supervision; for this reason alone, the court of appeals was obliged to remand this case to the district court for new factfinding. *See Icicle Seafoods,* 106 S. Ct. at 1530; *Swint,* 456 U.S. at 292.

In addition, the bulk of the Group of 500 had completed their initial qualification training prior to May 17 and were therefore "provisionally qualified to serve as United second officers, lacking only their IOE to become fully qualified." (App. 66a-67a). Even assuming that the initial qualification training did not constitute work under United's supervision, the court of appeals erred in simply assuming that the refresher training in May could not constitute work under a carrier's supervision. Engaging in recurrent, transition, upgrading, and requalification training is an integral part of serving as a United pilot. *See United Air Lines, Inc.,* 9 N.M.B. at 276-79; *United Air Lines, Inc.,* 4 N.M.B. 30, 35-36 (1965); *see also* 14 C.F.R. § 121.441 (mandating annual proficiency training or checks). The extent to which United's "refresher" training was different from initial qualification training or similar to the various types of recurrent and other training in which United pilots routinely engage constitutes a question of fact which was not addressed by either the district court or the court of appeals but is obviously "essential to a proper resolution of the legal question" under the court of appeals' interpretation of § 1, Fifth. *See Icicle Seafoods,* 106 S. Ct. at 1530.

At the very least, the record in this case presents substantial factual issues material to the court of appeals' new legal standard which the district court never addressed. Having reversed the district court on the legal standard, " 'the Court of Appeals should not have resolved in the first instance th[ese] factual dispute[s] which had not been considered in the District Court.' " *See Swint*, 456 U.S. at 292 (quoting *Demarco* v. *United States*, 415 U.S. 449, 450 n.* (1974)); *see also Icicle Seafoods*, 106 S. Ct. at 1530 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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